

APPENDIX A: STATUTE INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. (1952 ed.) 1101 *et seq.*, are Sections 235, 236, 242, and 360 (a).

1. Section 235 of the Act, 66 Stat. at 198, 8 U. S. C. (1952 ed.) 1225, provides in pertinent part:

INSPECTION BY IMMIGRATION OFFICERS

SEC. 235. * * * (b) Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 273 (d), who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

(c) Any alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under paragraph (27), (28), or (29) of section 212 (a) shall be temporarily excluded, and no further inquiry by a special inquiry officer shall be conducted until after the case is

reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman.

2. Section 236 of the Act, 66 Stat. at 200, 8 U. S. C. (1952 ed.) 1226, provides:

EXCLUSIONS OF ALIENS

SEC. 236. (a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 235 shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer

shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 235 and 287 (b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

(b) From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 235 (3). From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attorney General. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as provided in section 235 (c) such decision shall be rendered solely

upon the evidence adduced before the special inquiry officer.

(c) Except as provided in subsections (b) or (d), in every case where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

(d) If a medical officer or civil surgeon or board of medical officers has certified under section 234 that an alien is afflicted with a disease specified in section 212 (a) (6), or with any mental disease, defect, or disability which would bring such alien within any of the classes excluded from admission to the United States under paragraphs (1), (2), (3), (4), or (5) of section 212 (a), the decision of the special inquiry officer shall be based solely upon such certification. No alien shall have a right to appeal from such an excluding decision of a special inquiry officer. If an alien is excluded by a special inquiry officer because of the existence of a physical disease, defect, or disability, other than one specified in section 212 (a) (6), the alien may appeal from the excluding decision in accordance with subsection (b) of this section, and the provisions of section 213 may be invoked.

3. Section 242 of the Act, 66 Stat. at 208, 8 U.S. C. (1952 ed.) 1252, provides in pertinent part:

APPREHENSION AND DEPORTATION OF ALIENS

SEC. 242. * * * (b) A special inquiry officer shall conduct proceedings under this

section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section

in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held; -

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. * * *

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General

shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. * * *

* * * * *

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a), who shall willfully fail or refuse to depart from the United States within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court, * * * shall upon conviction be guilty of a felony * * *

* * * * *

4. Section 360 (a) of the Act, 66 Stat. at 273, 8 U. S. C. (1952 ed.) 1503 (a), provides in pertinent part:

PROCEEDINGS FOR DECLARATION OF UNITED
STATES NATIONALITY IN THE EVENT OF DE-
NIAL OF RIGHTS AND PRIVILEGES AS
NATIONAL

SEC. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States

and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. * * *

**APPENDIX B: COURT OF APPEALS' OPINION AND
JUDGMENT, AND DISTRICT COURT'S FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

**United States Court of Appeals for the District of
Columbia Circuit**

No. 12117

TOM WE SHUNG, APPELLANT

v.

**HERBERT BROWNELL, JR., ATTORNEY GENERAL
OF THE UNITED STATES, APPELLEE**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Decided October 13, 1955

**Before EDGERTON, WILBUR K. MILLER, and FAHY
Circuit Judges**

EDGERTON, Circuit Judge: Before the 1952 Immigration and Nationality Act¹ was passed, the Attorney General ordered Tom We Shung excluded from the United States and Tom We Shung sought review under the Administrative Procedure Act and a declaratory judgment. We decided against him on the merits. 93 U. S. App. D. C. 32, 207 F. 2d 132. The Supreme Court, citing *Heikkila v. Barber*, 345 U. S. 229, vacated our judgment and remanded the case to

¹ 66 Stat. 163, 8 U. S. C. § 1101 *et seq.*

the District Court with directions to dismiss the complaint. *Tom We Shung v. Brownell*, 346 U. S. 906. The Supreme Court thereby held that an exclusion order, like a deportation order, could not be reviewed, otherwise than in habeas corpus, on a complaint filed before the 1952 Act took effect.

Obviously our judgment settled nothing, since it was vacated. After the 1952 Act took effect Tom We Shung filed the present complaint, based on the same exclusion order and seeking the same relief. The District Court ruled that it was "without jurisdiction to review an order of exclusion in proceedings other than habeas corpus."

We think the court had jurisdiction to review the order of exclusion. *Estevez v. Brownell*, — U. S. App. D. C. —, — F. 2d —, decided today. Since the complaint was filed after the 1952 Act took effect, we think it immaterial, so far as the right to judicial review is concerned, that the exclusion order was issued before the Act took effect. *Muscardin v. Brownell*, — U. S. App. D. C. —, — F. 2d —, decided today.

The present question, whether review may be had on a complaint filed after the 1952 Act took effect, is not *res judicata*, since it neither was nor could have been decided in the previous suit, filed before the Act took effect.²

Reversed.

² In this respect we disagree with *Heikkila v. Barber*, 216 F. 2d 407 (9th Cir.), cert. denied, 349 U. S. 927.

United States Court of Appeals for the District
of Columbia Circuit

OCTOBER TERM, 1955

No. 12117

TOM WE SHUNG, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF
THE UNITED STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before EDGERTON, WILBUR K. MILLER and FAHY,
Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated October 13, 1955.

Per Circuit Judge EDGERTON.

Filed October 13, 1955.

United States District Court for the District of
Columbia

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed January 27, 1954)

This cause having come on for hearing on plaintiff's motion for preliminary injunction and defendant's opposition thereto, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is an action for declaratory judgment to review an order excluding the plaintiff from admission to the United States.

2. The complaint was filed on December 15, 1953 and subsequent to the enactment of the Immigration and Nationality Act of 1952 (66 Stat. 163).

CONCLUSIONS OF LAW

1. The Court is without jurisdiction to review an order of exclusion in proceedings other than habeas corpus.

2. Preliminary injunction should not issue.

MATTHEW F. MCGUIRE,

Judge.

APPENDIX C: ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

No. —, October Term, 1955

HERBERT BROWNELL, JR., ATTORNEY GENERAL

v.

JOSE BERNARDO ESTEVEZ

HERBERT BROWNELL, JR., ATTORNEY GENERAL

v.

TOM WE SHUNG

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT
OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 10th, 1956.

(Sgd.) EARL WARREN,
Chief Justice
of the United States.

Dated this 9th day of January 1956.

APPENDIX D: OPINION OF THE COURT OF APPEALS
IN ESTEVEZ v. BROWNELL

United States Court of Appeals for the District
of Columbia Circuit

No. 12417

JOSE BERNARDO ESTEVEZ, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF
THE UNITED STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Decided October 13, 1955

Before EDGERTON, WILBUR K. MILLER, and FAHY,
Circuit Judges

EDGERTON, *Circuit Judge*: Appellant's complaint, filed in 1954, says he is a native and citizen of Honduras, last arrived in the United States in 1953, and was ordered excluded under § 212 (a) (22) of the Immigration and Nationality Act of 1952, 66 Stat. 184, 8 U. S. C. § 1182 (a) (22), on the ground that he had previously left the United States to avoid military service. He contends that the necessary intent was not shown and that the exclusion proceedings were defective in other respects. He asks that these proceedings be declared void. The District Court

dismissed his complaint, on the ground that the court had no jurisdiction because an order of exclusion cannot be reviewed except by habeas corpus. We think the court erred.

If appellant were attacking a deportation order instead of an exclusion order, his right to the review he seeks would be clear. *Shaughnessy v. Pedreiro*, 349 U. S. 48. We think the principle of that case extends to this one.³ The pertinent provisions of the 1952 Act in respect to deportation and in respect to exclusion are substantially similar. Section 242 (b) says: "In any case in which an alien is ordered deported * * * the decision of the Attorney General shall be final * * *." 66 Stat. 210, 8 U. S. C. §1252 (b). Section 236 (c) says: "where an alien is excluded from admission * * * the decision of a special inquiry officer shall be final unless reversed by the Attorney General." 66 Stat. 200, 8 U. S. C. §1226 (c).

It is irrelevant that with regard to a "person who has been issued a certificate of identity under the provisions of subsection (b)" and is "in possession thereof", §360 (a) of the Act provides that a "final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise." 66 Stat. 273, 274, 8 U. S. C.

³ Although the exclusion case of *Tom We Shung v. Brownell*, 346 U. S. 906, involved the 1917 Act, and the present case involves the 1952 Act, it is perhaps significant that in *Tom We Shung* the Supreme Court relied solely on *Heikkila*, a deportation case.

§ 1503 (c). Appellant is not "any such person". It does not appear that he "has been issued", or has applied for, a certificate of identity under the provisions of subsection (b). It appears that he is not entitled to one, for only certain classes of persons who claim to be nationals of the United States are entitled to certificates, and appellant says he is a citizen of Honduras.* Section 360 (a) of the 1952 Act, 66 Stat. 273, 8 U. S. C. § 1503 (a), likewise has no application here. It applies only to persons "within the United States" who claim "a right or privilege as a national of the United States."

Reversed.

* In *Rubinstein v. Browne*, 92 U. S. App. D. C. 328, 331, 206 F. 2d 449, 452, a deportation case, we had no occasion to point out that § 360 (c) does not apply to all exclusion cases.